APPENDIX A

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 81 C 1305

WILLIAM L. PORTO,

Plaintiff,

—vs.—

CANON, U.S.A., INC.,

Defendant.

MEMORANDUM OPINION AND ORDER

Plaintiff, William L. Porto, filed this action against defendant, Canon, U.S.A., Inc., alleging violations of Title VII, 42 U.S.C. § 2000e, and 42 U.S.C. § 1981. Specifically, plaintiff alleges that defendant has established a hiring, promotional and employment system which limits the employment and promotional opportunities of non-Japanese national origin employees. Moreover, plaintiff alleges that if he were of Japanese national origin, he would not have been fired. Currently pending is defendant's motion to dismiss.

Plaintiff objects to the motion to dismiss because defendant filed the motion after it had filed an answer to the complaint. Rule 12(b) provides that a motion to dismiss "shall be made before pleading if a further pleading is permitted." Thus,

courts have noted that motions to dismiss for failure to state a cause of action upon which relief can be granted should be made prior to service of a responsive pleading. *See, e.g., Bowen v. Pan American World Airways, Inc.*, 474 F.Supp. 563 (S.D.N.Y. 1979); *United States v. City of Philadelphia*, 482 F.Supp. 1274 (E.D.Pa. 1979), *aff'd*, 644 F.2d 187 (3d Cir. 1980). However, both these cases recognize that the substance of a motion to dismiss may be considered after the pleadings are closed as a motion for judgment on the pleadings under Rule 12(c).

Moreover, the purpose of requiring a motion under 12(b) to be filed before service of a responsive pleading is to determine the sufficiency of the complaint before requiring the parties to undergo the expense of discovery and further litigation. There is no reason for this court to allow discovery and trial to proceed, only to hold, after a trial on the merits, that the complaint fails to state a cause of action as a matter of law. Thus, whether the court considers the motion under 12(b) or (c), the court still must reach the substance of defendant's arguments.

Defendant's substantive argument is a most unique one. Defendant argues that Title VII is not applicable because it has been superseded by the Treaty of Friendship, Commerce and Navigation between the United States and Japan. Defendant also argues that plaintiff's complaint does not state a cause of action under § 1981 because that section does not apply to discrimination based on national origin. Each argument is considered in turn.

The treaty, entered into on April 2, 1953, provides in Article VIII(1):

> "Companies of either Party shall be permitted to engage, within the territory of the other Party accountants and other technical experts, executive personnel, attorneys, agents and other specialists *of their choice*." (Emphasis supplied.)

Defendant contends that this provision allows it to discriminate in favor of Japanese nationals for executive and technical

positions. The Fifth Circuit has accepted defendant's arguments despite the blistering and well-reasoned dissent of Judge Reavley. *Spiess v. C. Itoh & Company, Inc.*, 643 F.2d 353 (5th Cir. 1981). The Second Circuit has held to the contrary. *Avigliano v. Sumitomo Shoji America, Inc.*, 638 F.2d 552 (2d Cir. 1981).

Defendant's argument presents two questions. Since defendant is a subsidiary, organized in the United States, of a parent Japanese corporation, the first question is whether an American subsidiary of a Japanese corporation is a Japanese company for the purposes of the treaty. Assuming that defendant is a Japanese company within the meaning of the treaty and entitled to invoke the Article VIII rights, the second inquiry is whether this article gives defendant a limited right to discriminate in favor of Japanese nationals. For the reasons stated below, the court concludes that defendant is not a Japanese company for treaty purposes and that even if it were, Article VIII(1) does not exempt it from Title VII.

Article XXII(3) of the Treaty provides:

> "[*C*]*ompanies constituted under the applicable laws* and regulations within the territories of either Party *shall be deemed companies thereof* and shall have their juridical status recognized within the territories of the other Party." (Emphasis supplied.)

The clear language of this article suggests that a "company of Japan" is only an entity constituted under the applicable laws of that country and consequently a company for purposes of the treaty should be determined by its place of incorporation. Since defendant is incorporated under the laws of the United States and not Japan, the clear language of the treaty dictates that defendant "shall be deemed [a] compan[y]" of the United States.

Despite this clear language, two courts of appeals have concluded that an American subsidiary owned by a Japanese corporation is a Japanese company within the meaning of the treaty. *Spiess*, *supra*; *Avigliano*, *supra*. Both the Second and Fifth Circuits admitted that they were departing from a literal

reading of the treaty, but justified this departure on three major grounds: (1) the purpose and history of the treaty mandate the conclusion that Article XXII(3) merely guarantees legal recognition to diverse forms of legal entities and does not determine which of those entities can assert treaty rights; (2) to read the treaty literally would exhalt form over substance; and (3) to read the treaty literally would result in a "crazy-quilt pattern" of rights for subsidiaries.

For the reasons stated in *United States v. R.P. Oldham Co.*, 152 F.Supp. 818, 823 (N.D.Cal. 1957), and Judge Reavley's dissent, this court finds the Second and Fifth Circuit's analysis unpersuasive. The court, for the reasons stated by Judge Reavley, concludes that Article XXII(3) does not allow American subsidiaries to invoke the rights of Article VIII(1).

The Japanese treaty is one in a long line of Friendship, Commerce and Navigation treaties (FCN) negotiated on a bilateral basis between the United States and other countries. The purpose of these treaties is to create a medium through which two nations provide "for the rights of each country's citizens, their property and other interests, in the territories of the other, and for the rules mutually to govern their trade and shipping." Walker, *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 Am.J.Comp.L. 229, 230-31 (1956); *see, generally*, Walker, *Modern Treaties of Friendship, Commerce and Navigation*, 42 Minn.L.Rev. 805 (1958). The FCN treaties, including the Japanese treaty, are self-executing treaties. Such treaties are the supreme law of the land and supersede inconsistent state law. Federal statutes should not be construed to violate the treaty if any other possible construction remains and only when Congress clearly intends to depart from the obligations of a treaty will inconsistent federal legislation govern. *Spiess, supra.*

In interpreting Article XXII not to determine which forms of corporate organization were entitled to assert treaty rights, but only to ensure that unfamiliar organizations would be recognized as companies by the legal institutions of the respective countries, the Fifth Circuit relied on several State Depart-

ment memoranda and several articles written by Herman Walker, an FCN authority.[1]

Judge Reavley thoroughly discussed the materials relied on by the majority in *Spiess*. For the same reasons that he found them unpersuasive, this court also finds them unpersuasive. The court need not repeat that discussion here. *Spiess*, 643 F.2d at 371-72.

Moreover, Judge Reavley also found affirmative support for his view in the history of the treaty. One such document is a dispatch sent from the Secretary of State Acheson to the Treaty negotiators. The dispatch apparently concerned the meaning of Article XXI(e). It provides:

> "The analysis of this question begins with the second sentence of Article XXII, Paragraph 3, which establishes that whether or not a juridical entity is a *'company' of either Party, for treaty purposes, is determined solely by the place of incorporation*. Such factors as location of the principal place of business or the nationality of the majority stockholders are disregarded." (Emphasis supplied.)

Judge Reavley also noted that the view taken by Acheson that a company for treaty purposes is determined solely by the place of incorporation is confirmed by a State Department dispatch from Secretary of State Kissinger. In this dispatch, Kissinger clearly states that a "company's status and nationality are determined by place of establishment." This court agrees with Judge Reavley that these secondary sources confirm a literal reading of the treaty and undermines the Fifth Circuit's conclusion that the history of the treaty justifies a departure from that literal reading.

Even if this court accepted the Fifth and Second Circuits' conclusion that the treaty merely guarantees legal recognition

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1 The Second Circuit relied on the history of the negotiations preceding the ratification of a similar treaty between the United States and the Netherlands. While not irrelevant to the question before the court, this court finds the history of the treaty with Japan more probative of the question of the purpose of the treaty than the materials relied on by the Second Circuit.

to diverse forms of legal entities and does not determine which of those entities can assert treaty rights, the court would still have to determine whether an American subsidiary of a parent Japanese corporation is a Japanese company or an American company. That is, if Article XXII does not define a corporation's nationality for purposes of the treaty, how does international law determine the nationality of a corporation? International law is clear that an international corporation has the nationality of its place of incorporation. *Barcelona Traction, Light and Power Company, Ltd. (Belgium v. Spain)*, 1970 I.C.J. Rep. 3, 42 (International Court of Justice) H. Walker, *Companies*, ch. VII in R.R. Wilson, *United States Commercial Treaties and International Law* 182, 193 (1960). Thus, under international law, since defendant is incorporated under the laws of the United States, for purposes of the treaty, it would be an American company and not a Japanese company. In sum, the clear language of the treaty, the history of the treaty and the settled principles of international law all establish that an American subsidiary of a Japanese company is an American company for treaty purposes.

The Second Circuit also argued that "to hold that [a] Japanese business enterprise forfeits its rights under the Treaty merely because it chooses to function through a wholly-owned locally-incorporated subsidiary would in our view disregard substance for form." *Avigliano*, 638 F.2d at 556. This court disagrees with this conclusion for two reasons. First, as Judge Reavley points out in his dissent, wholly owned subsidiaries of Japanese corporations are specifically given several rights under the treaty. Indeed, the only "right" of major practical importance that depends on the company's place of incorporation is the one given in Article VIII(1). Second, whether a company chooses to operate as a wholly owned subsidiary or a branch of an existing corporation is not an inconsequential decision, as the Second Circuit suggests. The choice will have many legal consequences. For example, service of process on a subsidiary usually does not constitute effective service on the parent. As well, when a corporation decides to form a subsidi-

ary, it considers the tax and conflict of laws consequences of its decisions. If a corporation decides to organize under American law in order to invoke these benefits, it does not seem unfair to require it to accept the burdens of American law. Consequently, this court cannot agree that its interpretation of the treaty disregards substance for form.

Finally, both the Second and Fifth Circuits argued that interpretation of Article XXII(3) as to subsidiaries would create a "crazy-quilt pattern" in which branches of Japanese corporations would enjoy broad rights under the treaty while subsidiaries would be entitled only to minor protection. Under a literal reading of the treaty, a company is considered a "company of Japan" only if it is incorporated in Japan. Consequently, American incorporated subsidiaries of Japanese corporations are only entitled to treaty protection when they are specifically mentioned. Both the Second Circuit and Fifth Circuit argue that "[i]t is illogical to infer that the drafters of the Treaty intended to make such a dramatic distinction between forms of business operation." *Avigliano*, 638 F.2d at 556. Once again, for the reasons stated by Judge Reavley, this court must disagree with the conclusion of the Fifth and Second Circuits.

The most important reason why this court disagrees with the argument of the Fifth and Second Circuits is that it defies the plain meaning of Article XXII(3). The court agrees with both the Fifth and Second Circuits that one of the purposes of this article is to determine when the juridical entity designated as a "company" exists. But, if this is the only purpose of the clause, the existence of the phrase "shall be deemed companies thereof" is rendered superfluous. As Judge Reavley asked, "What is the meaning of this phrase if not to determine corporate nationality for the purposes of the Treaty?" *Spiess*, 643 F.2d at 364.

An analysis of the treaty structure and articles supports a literal reading of Article XXII(3), despite the Second and Fifth Circuits' arguments to the contrary.

First, the treaty consistently uses three terms of art to allocate benefits among private parties: "nationals," "compa-

nies" and "enterprises controlled by such nationals or companies." The fact that the framers used three separate terms indicates that each term was to represent a distinct entity. But under the Fifth and Second Circuits' views, there would be no reason to use the term "enterprises controlled by such nationals or companies" since that entity is already a "company" or a "national." Thus, that view renders the last term meaningless and creates additional confusion and redundancy. This court's analysis, on the other hand, gives each term a distinct meaning and eliminates any confusion or redundancy.

Second, two articles of the treaty are clearly based on the assumption that a company has the nationality of its place of incorporation. The first sentence of Article VII(1) provides that nationals and companies of Japan are entitled to equality of treatment with nationals and companies of the United States. The second sentence, however, confers a narrower right on Japanese controlled American companies—the right of equality of treatment with subsidiary enterprises controlled by nationals and companies of the United States. This distinction, of course, only makes sense, if a Japanese controlled American subsidiary is considered a company of the United States. If this entity is a company of Japan, it would already be entitled to national treatment, and the grant of the narrower right would be meaningless.

Article XXI(1)(e) of the treaty also indicates that the nationality of the corporation is to be determined by its place of incorporation. Judge Reavley's dissent makes this point persuasively, and his discussion need not be repeated here. *Spiess*, 643 F.2d at 366.

Third, under normal principles of statutory interpretation, if an item is specifically enumerated in one section of a statute but omitted from a similar enumeration in a closely related section, the exclusion is held to be intentional and meaningful unless plain reason or authoritative sources indicate otherwise. Articles VII(1), VII(4), XVI(2), VI(3) (read in conjunction with paragraph 2 of the protocol) and VI(4) grant express rights to nationals and companies of either party operating in the territory of the other party and then specifically extend the

same or similar rights to "enterprises controlled by such nationals or companies." Other adjacent articles, however, extend rights only to nationals and companies of either party and make no mention of controlled enterprises. The Fifth and Second Circuits conclude that such distinctions are haphazard. This court, applying accepted principles of statutory construction, cannot agree. The history of the treaty shows that it was drafted with great care and thought. The court must conclude that the drafters meant what they wrote and that the exclusion of the phrase "enterpises controlled by such nationals or companies" was intentional. Thus, the court must also conclude that the exclusion of the phrase, "enterprises controlled by such nationals or companies" from Article VIII(1) is intentional.

Moreover, the specific inclusion of the phrase "enterprises controlled by such nationals or companies" would be completely redundant if such enterprises were already companies. This is particularly true since in other articles the treaty also grants the same rights to "companies" that these five articles grant to enterprises controlled by such nationals. This court's construction of these two phrases eliminates the redundancy since each phrase is given a distinct meaning.

Furthermore, as Judge Reavley has noted, the "crazy-quilt pattern" of which the Fifth and Second Circuits complain does not emerge in as a dramatic form as one might think. While it is true that some 20 articles of the treaty do not use the phrase, "enterprises controlled by such nationals or companies," this court agrees with Judge Reavley that "the distinctions make little practical difference." *Spiess*, 643 F.2d at 369.[2]

Finally, these distinctions are not necessarily arbitrary as the Second and Fifth Circuits suggest. It makes perfect sense that the drafters of the treaty would want to confer a more complete set of rights on companies that are incorporated in Japan than they would for American subsidiaries that are owned by Japanese companies or nationals. For all of these

2 Judge Reavley has explained in his dissent why the distinctions do not have any great practical importance and his discussion need not be repeated here.

reasons, the court concludes that defendant is an American company for purposes of the treaty.

Even assuming, however, that defendant is a company of Japan for purposes of the treaty, it is less than clear that the phrase "of their choice" exempts the defendant from the mandates of Title VII.

Again, both the Fifth and Second Circuits have considered this question. The Fifth Circuit has concluded that the treaty does exempt American subsidiaries of Japanese parents from Title VII, *Spiess, supra*, while the Second Circuit has reached the opposite conclusion. *Avigliano, supra. Accord, Linsky v. Heidelberg Eastern, Inc.*, 470 F.Supp. 1181 (E.D.N.Y. 1974).

This court finds itself in agreement with the Second Circuit on this issue. At the time the treaty was negotiated, a number of American states and many foreign countries severely restricted the employment of noncitizens within their boundaries. *Avigliano, supra*; Note, *Commercial Treaties and the American Civil Rights Laws: The Case of Japanese Employers*, 31 Stan.L.Rev. 947 (1979). Article VIII of the treaty, which allows companies of either party to hire executive personnel "of their choice" when operating in the other party's land, was intended to exempt companies from these state restrictions on the employment of noncitizens. *Avigliano*, 638 F.2d at 559.

While it appears that Article VIII was intended to facilitate a party's employment of its own nationals, there is no evidence to support the broad interpretation which defendant urges. Defendant's argument, taken to its logical conclusion, would not only mean that defendant is exempt from Title VII, but from laws granting rights to unions and employees, Labor Management Relations Act, 29 U.S.C. §§ 141-187, and the like, and even possibly from laws prohibiting employment of children, § 12 of the Fair Labor Standards Act, 29 U.S.C. § 212. It also seems implausible that the treaty was intended to exempt defendant from Title VII since Title VII was passed after the treaty was ratified.

In view of these facts, the court concludes that subjecting a Japanese company to the mandates of Title VII is consistent with both the language and purpose of the treaty. This is

particularly true since Title VII does not preclude defendant from employing Japanese nationals in positions where such employment is reasonably necessary to the successful operation of its business. *Avigliano, supra*; 42 U.S.C. § 2000e-2(e). (The bona fide occupation qualification (BFOQ).) The Second Circuit has also noted that although the "BFOQ" is usually construed narrowly, in this situation, the "BFOQ" defense "must be construed in a manner that will give due weight to the Treaty rights and unique requirements of a Japanese company doing business in the United States." *Avigliano*, 638 F.2d at 559.[3]

For this second and independent reason, the court concludes that the treaty cannot form a basis upon which to dismiss the complaint.

This leaves for discussion plaintiff's claim under 42 U.S.C. § 1981. It is defendant's theory that 1981 does not prohibit discrimination on the basis of national origin. Plaintiff's response is two-fold: (1) § 1981 does prohibit discrimination on the basis of national origin; and (2) even if it does not, the complaint also alleges discrimination on the basis of race. Each of plaintiff's contentions is considered in turn.

The law is well settled in this district that in order for a plaintiff to predicate an action on this section, he must allege

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3 Although the complaint states that defendant is discriminating on the basis of national origin, the complaint also complains that defendant is discriminating in favor of Japanese *citizens*. While Title VII clearly forbids discrimination on the basis of national origin, it does not prohibit discrimination on the basis of citizenship. *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86 (1973). *See*, Note, *Treaties and Civil Rights Law, supra*. Thus, if defendant is illegally discriminating in favor of persons of Japanese national origin who are not Japanese citizens, a cause of action under Title VII may be stated. However, if defendant is discriminating only in favor of Japanese *citizens*, and not in favor of persons of Japanese national origin, it is doubtful that a cause of action is stated under Title VII. *Espinoza, supra*. Since neither party has raised this issue in their briefs, and the success of this argument may depend on a question of fact, the court declines to base its ruling on *Espinoza*, at this time. The court will, of course, entertain a motion to dismiss or for summary judgment on this theory if it does appear that defendant is only allegedly discriminating on the basis of citizenship.

discrimination on the basis of race. The section does not pertain to discrimination on the grounds of national origin. *Abshire v. Chicago and Eastern Illinois Railroad Co.*, 352 F.Supp. 601, 602 (N.D.Ill. 1972) (Judge Bauer); *Vasquez v. Werner Continental, Inc.*, 429 F.Supp. 513, 515 (N.D.Ill. 1977) (Judge Crowley); *Plummer v. Chicago Journeyman Plumbers*, 452 F.Supp. 1127 (N.D.Ill. 1978); *see, Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968). Consequently, the court concludes that § 1981 does not prohibit discrimination on the basis of national origin.

Although plaintiff in a few paragraphs of its complaint alleges that he is being discriminated against because of his race, the *facts* alleged do not support this conclusion. The plaintiff is not complaining that he is discriminated against because he is white. Rather, the complaint clearly alleges that plaintiff is being discriminated against because he is not of Japanese origin. There is nothing in the complaint to indicate that plaintiff is treated any differently than blacks, hispanics, American Indians or orientals. The only facts alleged indicate that defendant is giving preference to persons of Japanese national origin over all other persons. Consequently, the complaint focuses on national origin as the basis for the discrimination and does not state a claim for discrimination on the basis of race. Consequently, plaintiff's § 1981 claim must be dismissed.

For the reasons stated above, defendant's motion to dismiss is granted in part and denied in part; defendant's motion to dismiss plaintiff's claim under Title VII is denied; defendant's motion to dismiss plaintiff's claim under 42 U.S.C. § 1981 is granted, and the § 1981 claim is hereby ordered dismissed.

ENTER:

/s/ Bernard M. Decker

United States District Judge

DATED: September 9, 1981

APPENDIX B

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 81 C 1304

EDWARD L. MATTISON,

Plaintiff,

—v.—

CANON U.S.A., INC.,

Defendant.

DECISION ON DEFENDANT'S MOTION TO DISMISS

Defendant, after filing an answer to the complaint, filed a motion to dismiss pursuant to F.R.C.P. 12(b)(6) for failure to state a claim. The motion is supported by certain official documents and is opposed by an affidavit of the plaintiff. Therefore it can be considered as a motion for summary judgment, particularly since the motion raises important substantive issues which must be decided before we reach the merits.

The complaint alleges discrimination against the plaintiff on the basis of race, color and national origin. One of the jurisdictional bases alleged is the Fourteenth Amendment to the Constitution of the United States. This amendment does not reach claims of discrimination against private corporations. Therefore, this allegation of jurisdiction in paragraphs 1 and 15 are of no legal significance and should be stricken. *Shelley* v. *Kraemer*, 334 U.S. 1 (1948).

Plaintiff also alleges jurisdiction under the Civil Rights Act of 1866, 42 U.S.C. § 1981. This section applies to discrimination on the basis of race but not on the basis of national origin. *Johnson* v. *Railway Express Agency*, 421 U.S. 454 (1975). Plaintiff alleges discrimination against himself, a white person, and in favor of "Japanese" persons on the basis of "national origin or race" (pars. 13 and 15). Whether plaintiff can prove a claim of discrimination based upon "race" remains an issue of fact, perhaps one subject to expert testimony. In any event, the allegation of jurisdiction based on § 1981 is proper.

The third alleged basis for jurisdiction is Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e *et seq.*), which proscribes discrimination on the basis of either race or national origin. Defendant contends, however, that the pre-existing Treaty of Friendship, Commerce and Navigation between the United States and Japan dated April 2, 1953 gives it a right to favor Japanese Nationals and takes precedence over Title VII.

Article VIII(1) of that Treaty provides:

> Companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice.

Plaintiff alleges that by the time of his termination of employment on July 25, 1980 he held the position of Order Department Manager. Whether or not this constituted him an "executive personnel. . .[or] other specialists" within the meaning of the foregoing clause is another question of fact which cannot be decided on a motion to dismiss. We believe we can, however, decide whether or not the defendant is a "Company of either Party."

Defendant Canon is allegedly a wholly-owned subsidiary of Canon, Inc. Japan, a Japanese corporation. Plaintiff also alleges that defendant itself is a "Japanese" corporation with its principal place of business in Illinois (par. 6 of the complaint). However, the parties argue in their memoranda that defendant is incorporated under the laws of the United States.

Assuming this to be the fact, then the defendant is not within the coverage of Article VIII(1) of the Treaty. Article XXII(3) provides:

> Companies constituted under the applicable laws and regulations within the territories of either Party shall be deemed companies thereof and shall have their juridical status recognized within the territories of the other Party.

The foregoing language seems clear enough to us to mean that when a citizen (or corporation) of Japan creates a corporation in the United States for the purpose of doing business here, it then remains a corporation constituted under the laws and regulations of the United States. The fact that it is owned or controlled by persons who are not citizens of the United States is irrelevant under the above definition, and the United States subsidiary is therefore subject to Title VII which was adopted by Congress after the Treaty, and to § 1981 which was in existence before the Treaty was adopted.

In this we concur with the dissent of Judge Reavley in *Spiess* v. *Itoh & Co.*, 643 F.2d 353 (5th Cir. 1981) and disagree with the majority decision in that case and the decision in *Avigliano* v. *Sumitomo Shoji America*, 638 F.2d 552 (2d Cir. 1981).

Our foregoing difference of opinion with the Second and Fifth Circuit Courts of Appeals is of course of no significance if plaintiff was not the type of employee covered by Article VIII(1) or if he cannot prove a *prima facie* case of discriminatory discharge. Furthermore, the Second Circuit at least has ruled that the language of Article VIII(1) does not give any employer, domestic or otherwise, a blanket exemption from Title VII merely because it can employ certain persons "of their choice."

The Civil Rights Act of 1964 is a basic part of the legal fabric of our Nation and was passed by both branches of Congress. The statute grants an exemption for hiring on the basis of national origin when "reasonably necessary to the normal operation of that. . .business" (42 U.S.C. § 2000e 2(e)). We must assume that Congress either believed the two

documents were thereby made consistent or it intended to amend the favored nationality provision of Article VIII(1) of the Treaty. We prefer to adopt the former alternative, but even if this is unrealistic, treaties are not graven in stone in perpetuity and regardless of the historical developments which have occurred since 1953.

In any event, defendant's motion to dismiss, filed May 20, 1981, is denied, with the exception that it is granted as to the allegations of violation of the Fourteenth Amendment to the Constitution of the United States.

This case will be called for a report on status on Tuesday, October 13, 1981 at 11:00 a.m. for the purpose of setting a time for completion of all discovery and for trial.

ENTER:

/s/ Thomas R. McMillan

JUDGE, U.S. DISTRICT COURT

DATED: Oct. 1, 1981

APPENDIX C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

No. 77 C 833

JAMES M. LINSKEY,

Plaintiff,

—against—

HEIDELBERG EASTERN, INC., THE EAST ASIATIC COMPANY, INC., THE EAST ASIATIC COMPANY, LTD.,

Defendants.

MEMORANDUM OF DECISION AND ORDER

COSTANTINO, D.J.

This is a motion by the defendants for summary judgment and/or dismissal of the complaint. The issue in this motion concerning the defendants' liability under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq.*, was previously before this court and the court denied defendants' motion. *See Linskey v. Heidelberg Eastern, Inc.*, 470 F. Supp. 1180 (E.D. N.Y. 1979). Defendants now maintain that that recent appellate case law in the Second Circuit, *see Avigliano v. Sumitomo Shoji America, Inc.*, 638 F.2d 552 (2d Cir. 1981), and in the Fifth Circuit, *see Spiess v. C. Itoh & Co. (America), Inc.*, 643 F.2d 353 (5th Cir. 1981), suggests that this court's previous decision was improper, and that the court should now grant defendants' motion. The court has reviewed

the documents and case law submitted by defendants in support of their position, and concludes that its previous decision was correct, and should not be disturbed. Thus, for reasons set forth below, the motion is denied.

The facts and parties in this action are well known to the court. Briefly, plaintiff, James Linskey ("Linskey"), was an employee of Heidelberg Eastern, Incorporated ("Heidelberg") for 14 years before his discharge on October 31, 1975. Heidelberg is a subsidiary of the East Asiatic Company, Incorporated ("EAC, American"). EAC, American is a subsidiary of East Asiatic Company, Limited ("EAC, Denmark"). Both Heidelberg and EAC, American are domestic corporations doing business in New York. EAC, Denmark is a foreign corporation incorporated under the laws of Denmark.

In 1961, Heidelberg hired Linskey as an Assistant Treasurer. By 1975, Linskey, then 55 years of age, had advanced to become the Treasurer of Heidelberg. As treasurer, Linskey was the second highest ranking officer in Heidelberg and was responsible for fiscal affairs. His two claims for relief charge Heidelberg, EAC, American and EAC, Denmark with discharging him because he was an older American citizen, and not a Danish citizen. He bases his first claim on an assertion of national origin discrimination in violation of Title VII and his second claim on a violation of the age discrimination provisions of the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621, *et seq.*

The defendants maintain, herein, that their actions, as a Danish corporation and its American subsidiaries, are exempt from the mandates of Title VII because of certain provisions in the Treaty of Friendship, Commerce and Navigation ("FCN") with Protocol between the United States of America and the Kingdom of Denmark, (1951), 12 U.S.T. 908, T.I.S. 4797, 421 U.N.T.S. 105 ("The Danish Treaty").[1] Specifically, the defen-

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1 When The Danish Treaty defense was first before this court, the only defendant who asserted the defense was EAC, Denmark. The Second Circuit, however, in *Avigliano v. Sumitomo Shoji America, Inc., supra*, permitted Japanese subsidiaries incorporated in the United States to invoke FCN treaty provisions to the same extent as native

dants rely on Article VII, § 4 of The Danish Treaty which provides as follows:

> Nationals and companies of either party shall be permitted to engage, within the territories of the other Party, accountants . . . other technical experts, and executive personnel . . . of their choice, *regardless of nationality*. (emphasis supplied)

It is defendants' position that this provision permits Danish companies under prescribed circumstances to discriminate in favor of Danish nationals. Thus, defendants argue that, since Linskey's office as Treasurer fell within the definition of "executive personnel" in Article VII, § 4, they had the right to dismiss and select this officer without regard to the mandates of Title VII.

In support, defendants cite the Second Circuit's decision in *Avigliano v. Sumitomo Shoji America, Inc.*, *supra*, and the Fifth Circuit's decision in *Spiess v. C. Itoh & Co. (America), Inc.*, *supra*. In *Avigliano*, female employees filed suit against the defendant alleging sexual and national origin discrimination under Title VII for defendants' practice of hiring only male Japanese nationals for management level positions. As in this case, the defendant asserted that its acts were exempt from Title VII because of certain provisions in the 1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan, 4 U.S.T. 2063 ("The Japanese Treaty"). Specifically, the defendant cited Article VIII of The Japanese Treaty which provides as follows:

> Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists *of their choice*. (emphasis supplied)

Japanese corporations operating in the United States. On the basis of *Avigliano*, the defendants herein have moved for summary judgment and/or dismissal on behalf of all three defendants including the Danish subsidiaries, Heidelberg and EAC, America.

In its decision, the *Avigliano* court acknowledged the applicability of the "of their choice" language, but refused to allow the defendant to use this language as the basis for an executive personnel exception from the nationality discrimination restrictions in Title VII. The *Avigliano* court reasoned that the purpose of the "of their choice" language provision was to give citizens of foreign countries, in that case Japan, the same status as citizens of the host country, not to afford the foreign company the option of discriminatory in favor of its nationals when hiring and discharging employees. *Id.* at 559. As the Second Circuit noted

> Although the clause "of their choice" was . . . intended, in furtherance of the overall purpose of the Treaty, to facilitate a party's employment of its own nationals to the extent necessary to insure its operational success in the host country, no evidence supports Sumitomo's broad interpretation which carried to its logical conclusion, would immunize a party not only from Title VII but also, from laws prohibiting employment of children, § 12 of the Fair Labor Standards Act, 29 U.S.C. § 212, laws granting rights to unions and employees, Labor Management Relations Act, 29 U.S.C. §§ 141-87, and the like. *Id.* at 559.

As opposed to allowing a loop-hole to be made in the dictates of Title VII, the *Avigliano* court concluded that subjecting the defendant to the "bona fide occupational qualification" ("bfoq") exception in Title VII, *see* section 703(e) of Title VII, 42 U.S.C. § 2000e-2(e), and forcing the defendant to show that national origin is a necessary qualification for the position in question would "not . . . impose undue burden on foreign employees." *Avigliano v. Sumitomo Shoji America, Inc., supra*, 638 F.2d at 559.[2]

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2 Section 703(e) of Title VII, 42 U.S.C. § 2000e-2(e), expressly provides that "it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of . . . national origin in those certain instances where . . . national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . .

In a contrary ruling, the Fifth Circuit, in *Spiess v. C. Itoh & Co. (America), Inc., supra*, when faced with the identical provision in The Japanese Treaty and with allegations of discrimination under Title VII, rejected the *Avigliano* court's ruling making the following observation:

> Considering the Treaty as a whole, the only reasonable interpretation is that article VIII(1) means exactly what it says: Companies have a right to decide which executives and technicians will manage their investment in the host country laws. *Id.* at 361.

The Fifth Circuit has thus split the circuits and has elevated the "of their choice" language to a point where foreign companies whose native countries are parties to FCN treaties with similar provisions may openly discriminate on the basis of nationality, and give additional consideration to their national employees in this country. Specifically, the *Spiess* court held that " [t]o make this right subject to Title VII's bfoq requirements . . . would render its inclusion in the [Japanese] Treaty meaningless. Thus, we hold that the article VIII(1) 'of their choice' provision permits Japanese companies to discriminate in favor of their fellow citizens." *Id.* at 362.

With this background, defendants argue that, unlike the broad "of their choice" provision in The Japanese Treaty, the more narrow regardless of nationality" provision in The Danish Treaty carves out a limited exception for nationality, and that consequently, they do not have to meet the bfoq exception of Title VII to avoid potential liability. Moreover, defendants assert that the *Avigliano* court's interpretation of the "of their choice" provision in The Japanese Treaty does not mandate a contrary result because, unlike the instant case, the "of their choice" language threatened to open the door to numerous exceptions to Title VII, whereas the "regardless of nationality" language in The Danish Treaty offered merely a limited exemption for nationals.

This argument, however, fails to consider that when faced with the rather broad "of their choice" language, the *Avigliano* court specifically focused on how the "nationality"

aspect of this phrase would conflict with Title VII. As a practical matter, the *Avigliano* court treated the "of their choice" language as synonomous with the "regardless of nationality" language, and it still refused to carve out an exception from Title VII for nationals. This argument by the defendants seeks to create a distinction, when in fact, none exists.

In reality, defendants are asking this court to reject the Second Circuit's holding in *Avigliano* and adopt the Fifth Circuit's holding in *Spiess*. This court does concede that the Fifth Circuit's rationale is quite compelling as there is a strong argument for the theory that American businessmen like foreign businessmen sought provisions such as those contained in the Danish and Japanese Treaties "to ensure that the . . . businessman's investment in the host country would remain within his control." *Spiess v. C. Itoh & Co. (America), Inc.*, *supra*, 643 F.2d at 361. However, in the absence of legislative history demonstrating that Title VII was not intended to override the provisions of The Danish Treaty, this court must abide by its prior decision and the authority of *Avigliano*.

The court agrees with the defendants that fears expressed by the *Avigliano* court regarding exemption from child labor laws and laws concerning union relations, *see Avigliano v. Sumitomo Shoji America, Inc.*, *supra*, 638 F.2d at 559, which could result by exempting signatories to FCN treaties from the prescriptions of Title VII do not pertain to the instant action. There is, nonetheless, a firm commitment to uphold and support the progress of Title VII in its attempt to wipe out all forms of invideous discrimination, and this court perceives no compelling reason to put a chink in that armor. This court does not think it unduely burdensome to compel a party discriminating on the basis of nationality to meet the bfoq exception of Title VII to avoid potential liability. Such a procedure will afford the discriminating employer the opportunity to justify its actions while also safeguarding those rights that Title VII seeks to protect. Accordingly, the motion is denied.

The defendants also argue that even assuming plaintiff's Title VII claim, the claim fails on the merits because plaintiff was replaced by an American citizen, and thus, there was no nationality discrimination. *Citing Hudson v. International Business Machines*, 602 F.2d 351 (2d Cir. 1980), *cert. denied*, 101 S.Ct. 794 (1981). In rebuttal, plaintiff responds by contending that, while it may be that an American replaced him as Treasurer, plaintiff's actual duties were taken over by several Danish employees. The court will not dismiss plaintiff's claim at this point on the basis of defendants' broad allegations. There will come a time when plaintiff will be put to his proof, and at such time, a decision will be made regarding who took over what tasks, and whether such a division of responsibilities transpired after plaintiff's dismissal. At this time, however, proper facts are not before the court to make a final determination.

Finally, even if the court were to dismiss plaintiff's claim of nationality discrimination, the court would still be compelled to deny the motion to dismiss because there still remains the age discrimination question under the ADEA. The defendants never addressed this issue, and as far as the court is concerned, it continues to be an issue before the court.

Accordingly, defendants' motion is denied in all respects. The next conference in the matter is scheduled for October 23, 1981.

So Ordered.

/s/ Mark A. Costantino

United States District Judge